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Digital Content and Consumer Protection within European Law

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Abstract. This paper aims to analyse protection rules enacted at the European level to protect consumers (information duties, formal requirements, right of withdrawal, guarantees), in order to determine if they apply to digital contents and, if so, if these legal measures are adapted to their specific features. Propositions are also formulated to amend current legal framework and to correct any defects. The study will rely principally on a deep analysis of the consumer's weak position, in order to ensure a closer correlation between the objectives of the regulations and the enacted rules.

1 Introduction

Consumers are more and more recipients of digital content services. Among others, the following examples can be cited: free software used online without downloading (e.g. for the edition of documents – Software-as-a-Service); movies watched by streaming or downloaded and recorded on a DVD by the consumer; ringtones downloaded by a consumer under the age of 18 with his mobile phone using electronic money (ringtone as well as electronic money could be considered as virtual goods); cloud gaming¹; clothes purchased on Second Life for an avatar, etc. It must be stressed that, if various services can be considered to be digital services or even as virtual goods, many features can be pointed out to distinguish them from other types of services: the means of access or provision (software provided on a physical medium like a CD-ROM, downloaded and recorded on the consumer's computer or executed online through cloud computing services – SaaS, etc.), the business model on which providers and consumers rely (services provided against payment or financed by advertising) or the parties involved (consumers, professional suppliers, children under the age of 18, intermediaries, peer-to-peer platforms).

From a legal point of view, the provision of digital services is a very interesting case study, at the crossroads of several branches of Law, such as Contract Law, Consumer Law, Liability Law, Privacy Law (if personal data are collected),

¹ See Le Monde, "Onlive : L'avenir du jeu vidéo sera-t-il immatériel", 17 June 2010 (available at http://www.lemonde.fr/technologies/article/2010/06/17/onlive-l-avenir-du-jeu-video-sera-t-il-immateriel_1373934_651865.html).

International Private Law (if each party is located in a distinct country) or Intellectual Property Law (copyright protection and DRM measures). This last is very important: most digital services are protected by copyright and this aspect cannot be ignored.

This paper cannot bring answers to all the numerous issues related to these branches. Instead, it will only focus on consumer protection (B2C and C2C relationships), given the hypothesis of a contract regarding digital services concluded and performed online. Taking into account the international scope of the conference, this paper will focus on the European legal framework. In the specific matter of consumer protection, such analysis is particularly recommended given that many directives have been enacted towards this end.

The paper will be divided into two parts. First, a short overview of the European legal framework protecting consumers will be presented. The objectives of the rules will be explained and, taking into account their scope, their application to digital services will be discussed. In the second part of the paper, key consumer protection measures will be analyzed: information duties, formal requirements, right of withdrawal, prohibition of unfair contract terms and unfair commercial practices, guarantees, etc. The question is to establish whether these rules apply (or should apply) to digital content, if new protection measures should be established or if the legal framework should be simplified (and some regulations removed). In this context, specific issues will also have to be addressed, such as consumers that are legal minors (acquiring ringtones or videogames) or the technical limits of mobile commerce (to fulfil the service provider's duty to provide information).

2 Main objectives and scope of current legal framework protecting consumers

Many European directives are dedicated to consumer protection²: they deal with unfair contract terms³, unfair commercial practices⁴, sale of consumer goods and associated guarantees⁵, etc. Some legislative interventions are in particular ded-

² For an overview of Consumer Law within the European Union, see H. Schulte-Nölke (ed.), *EC Consumer Law Compendium – Comparative Analysis*, Universität Bielfeld, 2008, 845 p.

³ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *O.J.*, L 95 of 21 April 1993, p. 29-34 (hereafter, "directive 93/13/EEC on unfair contract terms").

⁴ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive"), *O.J.*, L 149 of 11 June 2005, p. 22-39 (hereafter, "directive 2005/29/EC on unfair commercial practices").

⁵ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees,

icated to contracts concluded at a distance – directive 97/7/EC on distance contracts⁶ – and by electronic means – directive 2000/31/EC on electronic commerce⁷. Recently (8 October 2008), a proposal for a directive on consumer rights has been adopted by the European Commission⁸: it merges four existing EU consumer directives – in particular directive 97/7/EC on distance contracts, directive 93/13/EEC on unfair contract terms and directive 1999/44/EC on sales of consumer goods.

Before determining whether digital services fall within the scope of these directives and analyzing the protection that they provide, it is very important to understand the reasons why European legislators decided to adopt them and establish a specific legal framework. Indeed, it must be stressed that, both in the qualification process (see section 2) and in the study of protection measures (see section 3 below), a functional analysis will be done to take into account this element.

In these directives, the *ratio legis* (that is, the reason of the law) for the protection measures lies specifically in the weak position of a consumer entering into a relationship with a supplier, a seller or a trader (acting in their commercial or professional capacity)⁹. European Legislator supposes that consumers mainly suffer from a lack of knowledge as regards legal or factual data related to the agreements and do not have the same bargaining power as the other party to the contract.

To ensure a high level of protection for consumers, protection rules (analyzed in section 3 below) have been enacted: right of withdrawal, information duties, formal requirements, prohibition of unfair contract terms or unfair commercial

O.J., L 171 of 7 July 1999 (hereafter, "directive 1999/44/EC on sales of consumer goods").

⁶ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, *O.J.*, L 144 of 4 June 1997 (hereafter directive 97/7/EC on distance contracts) Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (*O.J.*, L 271 of 9 October 2002, p. 16-24) could also be mentioned. In any case, it will not be analyzed further (the paper will not focus on digital content that could be considered as financial services).

⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, *O.J.*, L 178 of 17 July 2000, p. 1-16 (hereafter, "directive 2000/31/EC on electronic commerce").

⁸ COM (2008), 614 Final.

⁹ On the weakness of a contractual party, see F. Leclerc, *La protection de la partie faible dans les contrats internationaux (Etude de conflits de loi)*, Brussels, Bruylant, 1995; M. Fontaine, "La protection de la partie faible dans les rapports contractuels (Rapport de synthèse)", J. Ghestin and M. Fontaine (eds), *La protection de la partie faible dans les rapports contractuels. Comparaisons franco-belges*, Paris, L.G.D.J., 1996, p. 616 et seq.; Ch. Bourrier, *La faiblesse d'une partie au contrat*, Louvain-la-Neuve, Bruylant, 2003; H. Jacquemin, *Le formalisme contractuel. Mécanisme de protection de la partie faible*, Brussels, Larcier, 2010.

practices and conformity requirements and guarantees. The main objectives are to ensure informed consent and to prevent any potential fraud or abuse of the consumer's inherently weaker position, before the conclusion of, at the moment of or during the performance of the contract.

In order to analyze in depth the specific weakness of consumers, several features need to be taken into account: (2.1) the *object* of the contract; (2.2) the *purposes* (in/outside trade, business or profession) which for each party is entering into contract and (2.3) the *method* used to conclude the contract. It must be stressed that, in general, these features also determine the scope of application of the directives.

2.1 Object of the contract

In order to analyze the origin of the weak position of consumers with reference to the nature and the object of a contract (in our case study, provision of digital content), the scope of the abovementioned directives, related to the subject matter covered, will be analyzed (it is usually called the scope "*ratione materiae*"). A distinction can be made between two groups of directives whether or not their application to digital services is controversial.

a) Non controversial directives which apply to digital content

The subject matter covered by the scope of directives on unfair contract terms¹⁰ (93/13/EEC), on unfair commercial practices¹¹ (2005/29/EC) and on electronic commerce¹² (2000/31/EC) does not constitute an obstacle to the application of protection rules to digital services. From a general point of view, many features of the consumer's weak position are similar, regardless of the type of contract (sale, loan, rental, brokerage, etc.) or its object (goods or services, including real-estate, rights and obligations). It is clear that with regard to this area, the scope of these directives is defined widely. This means that neither the kind of contract nor its object is considered to be a direct cause of the consumer's disadvantage.

¹⁰ The scope of the directive on unfair contract terms is not limited *ratione materiae*.

¹¹ Directive on unfair commercial practices applies to "products", i.e. "any goods or service including immovable property, rights and obligations" (Art. 2 (c) of the directive). Digital services can be considered as "products" in the meaning of the directive.

¹² The scope of the directive on electronic commerce is much more stringent: it applies to "information society services", i.e. "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services" (Art. 2 (a) of the directive on electronic commerce, which refers to Art. 1 (2) of directive 98/34/EC as amended by Directive 98/48/EC). In any case, most digital services should be covered. Even if a specific price does not have to be paid to use the service (for instance, in the case of free software available online to edit SaaS documents), it is provided for remuneration, taking into account advertising incomes granted to the provider (in other words, these services clearly represent an economic activity).

The origin of this disadvantage must be found in the purpose for which each party is entering into the contract (see 2.2 below) or in the technical method used to conclude the contract (see 2.3 below). Moreover, it must also be stressed that, until now, at the European level, as far as the provision of digital content is concerned, it has not been considered necessary to provide additional specific protection rules. In the opinion of European legislator, consumers would not seem to suffer any additional disadvantage in this case. The opposite conclusion could have been drawn if protection rules applying specifically to digital services had been enacted.

b) Controversial directives which apply to digital content

As regards directive 1999/44/EC on sales of consumer goods and directive 97/7/EC on distance contracts, discussion is necessary. The question is to know whether the provision of digital services can be considered to be a "sale of consumer goods" (within the meaning of directive 1999/44/EC) and if they are "goods" or "services" (right of withdrawal regulation provided by directive 97/7/EC depends upon this distinction)¹³.

The directive 1999/44/EC on sales of consumer goods aims to protect consumers during the performance of the contract, in case of defect, and to grant them a guarantee. For the purpose of this directive, "consumer goods" shall mean "any tangible moveable item [...]"¹⁴. Accordingly, immovable or intangible items are not covered by the directive. With reference to our study, it is necessary to determine whether digital contents can be considered as tangible or not. No definition of "tangible item" is provided in the legal provisions. Discussion usually focused on software's inclusion in (or exclusion from) the scope of the directive. Among legal scholars, there is no unanimously accepted solution. In the opinion of some, it is a tangible item¹⁵, while others make a distinction between the software executed at a distance (for instance, through the internet), which would be intangible, and the software recorded on a physical medium (hard disk, CD-ROM, etc.), which would be tangible¹⁶. We could also ask if

¹³ On this question, see also F. Coppens, M. Demoulin, R. Robert and S. Dusollier, *Digital products in the acquis communautaire in the field of consumer protection*, Research study for the BEUC, 2009, p. 12 et seq.; M. Demoulin, *Droit des contrats à distance et du commerce électronique*, Brussels, Kluwer, to be published, 2010, nr 8 et seq.

¹⁴ Art. 1 (2)(a) of the directive.

¹⁵ M. Tenreiro and S. Gomez, "La directive 1999/44/CE sur certains aspects de la vente et des garanties de biens de consommation", *Revue européenne de droit de la consommation*, 2000, p. 12.

¹⁶ L. Serrano, "Article 1er. Champ d'application et définitions", M.C. Bianca, S. Grundmann and S. Stijns (dir.), *La directive communautaire sur la vente - Commentaire*, Brussels, Bruylant, Paris, L.G.D.J., 2004, p. 130. See also Ch. Biquet-Mathieu, "La garantie des biens de consommation - Présentation générale", *La nouvelle garantie des biens de consommation et son environnement légal*, Brussels, La Chartre, 2005, p. 64-65 (who considered that software or audio/video recordings

software¹⁷ – or any digital service – can be “sold”. Unlike tangible movable or immovable items, that are subject to property rights (real right implying *usus*, *fructus* and *abusus*), digital contents are protected by copyright and the buyer does not have similar rights.

Some rules of directive 97/7/EC on distance contracts depend upon the qualification given to the object of the contract – “goods” or “services”. This condition creates the right of withdrawal period and for exceptions to the exercise of the right of withdrawal. The words “goods” or “services” are not defined by directive 97/7/EC. In the proposal for a directive on consumer rights, “goods” are any “tangible movable item [...]”¹⁸; “sales contract” is defined as “any contract for the sale of goods by the trader to the consumer including any mixed-purpose contract having as its object both goods and services”¹⁹ and “service contract” can be considered as “any contract other than a sales contract whereby a service is provided by the trader to the consumer”²⁰. With reference to these definitions, listening to a song by streaming is a “contract service” and acquiring a CD of the same song could at the very least be considered as a “sale of goods”.

Due to the discrepancies in the construction of directive’s key concepts, there is a serious lack of legal certainty. The scope of these directives needs to be clarified, by a judgement of the European Court of Justice or, better still, by a legal provision.

A distinction must be made between *digital content in itself* (movie, music, software, game, etc.) and the *way it is provided to the recipient*²¹ (download, streaming, on a physical medium, in the context of cloud computing, etc.); accordingly, a distributive application of the rules must be made. In fact, for issues directly related to the digital content itself, it is not justifiable to create

“sold” on a physical medium are tangible items and admitted that the question was controversial as concerns downloading).

¹⁷ Actually, this question arises mainly for standard software (on this topic, see E. Montero, *Les contrats de l’informatique et de l’internet*, Brussels, Larcier, 2005, p. 72 et seq.; J. Huet, “De la ‘vente’ de logiciel”, *Etudes offertes à Pierre Catala – Le droit privé français à la fin du XXe siècle*, Paris, Litec, 2001, p. 799 et seq.; M. Vivant et al., *Lamy Droit de l’informatique et des réseaux*, Paris, Kluwer, 2008, p. 571 et seq.; A. Lucas, J. Devezé et J. Frayssinet, *Droit de l’informatique et de l’internet*, Paris, P.U.F., 2001, p. 488 et seq.). Contracts on specific software, designed at the request of the customer, is not considered as a “sale”.

¹⁸ Art. 2 (4) of the proposal for a directive on consumer rights.

¹⁹ Art. 2 (3) of the proposal for a directive on consumer rights.

²⁰ Art. 2 (5) of the proposal for a directive on consumer rights.

²¹ For an analysis of this topic (the distinction between physical medium or other provision means, and the content – data base, software, etc. –, as well as the qualification of each element, see S. Dusollier, *Droit d’auteur et protection des œuvres dans l’univers numérique*, Brussels, Larcier, 2007, p. 398 et seq.; E. Montero, *La responsabilité civile du fait des bases de données*, Namur, PUN, 1998, p. 238 et seq.; A. Lucas, “La responsabilité civile du fait des ‘choses immatérielles’”, *Etudes offertes à Pierre Catala – Le droit privé français à la fin du XXe siècle*, Paris, Litec, 2001, p. 816 et seq.

any discrimination between consumers whether the “goods” or “services” are downloaded online or supplied on a CD-ROM delivered by traditional mail.

In my opinion, *digital content in itself* is not a “tangible” item, regardless of how it is supplied to the recipient. This content is usually protected by copyright law, which determines the rights and duties of each party. In any case, with regard to protection rules related to the contract relationship, consumers should benefit from an equivalent protection, except where features of digital content require a different treatment (see section 3 below).

Regarding the *provision of digital content as such* (in other words, the method used to supply digital content to recipient), some distinctions can also be made. The physical medium is a “tangible item” and it can be “sold” to a customer. Therefore, this case is covered by directive 1999/44/EC on the sales of consumer goods. It must be stressed that, in my opinion, protection rules (guarantees, conformity duties) only apply for issues with a physical medium (for instance, a defective CD-ROM)²². When digital contents are downloaded (to be burned on a CD-ROM by the customer themselves), whether accessed (steamed movie) or executed online (document editing software), there is no “sale” of a “tangible” item. So, it should be considered a “contract service”²³.

2.2 Purposes for which parties are entering into contracts

a) Application to B2C relationships

The abovementioned directives have to be observed when a contractual relationship is established between a supplier²⁴, seller²⁵, trader²⁶ or service provider²⁷, who is usually acting in their commercial or professional capacity²⁸ and a consumer²⁹, who is acting for purposes which are outside their trade, business or profession. It is easy to understand that the average consumer is the weaker party to the contract (compared to a professional)³⁰. Indeed, their lack of legal

²² Contra, see above, footnote 15.

²³ In the meaning of the proposal for a directive on consumer rights.

²⁴ See definition in Art. 2 (c) of directive 93/13/EEC on unfair contract terms and in Art. 2 (3) of directive 97/7/EC on distance contracts.

²⁵ See definition in Art. 2 (c) of directive 93/13/EEC on unfair contract terms and in Art. 1 (2) (c) of directive 1999/44/EC on the sales of consumer goods.

²⁶ See definition in Art. 2 (b) of directive 2005/29/EC on unfair commercial practices.

²⁷ See definition in Art. 2 (b) of directive 2000/31/EC on electronic commerce.

²⁸ For “service provider”, see footnote 32 below.

²⁹ See the definition of consumer in Art. 2 (a) of directive 93/13/EEC on unfair contract terms; Art. 2 (2) of directive 97/7/EC on Distance contracts; Art. 1 (2) (a) of directive 1999/44/EC on sales of consumer goods; Art. 2 (e) of directive 2000/31/EC on electronic commerce; Art. 2 (a) of directive 2005/29/EC on unfair commercial practices.

³⁰ It must be stressed that, in some specific cases, the consumer – a lawyer specialized in contract law and ICT law – could be in a stronger position than the professional (who is specialized in selling items but not in the legal issues related to his activities).

knowledge or factual data of the contract relationship is pretty obvious³¹, as well as the unequal bargaining power – consumers can not usually negotiate the contract nor impose their own terms. In these circumstances, the professional party to the contract can take advantage from consumer's weak position to impose unfair contract terms (unbalanced liability exemptions, for instance) or use unfair commercial practices (misleading acts or omissions and/or aggressive commercial practices). Accordingly, directives have been adopted to regulate and prohibit these practices (directives 93/13/EEC and 2005/29/EC). The weakness of the consumer, in his relationship with the professional, can also explain regulations provided by directive 97/7/EC on distance contracts and directive 2000/31/EC on electronic commerce, together with the disadvantage due to the technology used (use of a means of distance communication and services provided by electronic means).

Most directives *only* apply to B2C relationships. This is the case of directive 93/13/EEC on unfair contract terms, directive 97/7/EC on distance contracts, directive 1999/44/EC on the sales of consumer goods and directive 2005/29/EC on unfair commercial practices. Directive 2000/31/EC on electronic commerce has a wider scope. It applies to B2B (when the service provider and the recipient of the service are not acting for purposes which are outside their trade, business or profession) and the B2C relationship (when the service provider is acting in the course of his trade, business or profession and the recipient of the service is an individual consumer)³².

b) Application to C2C relationships?

In many contract relationships involving digital content, the recipient is a consumer and the provider acts in the course of his trade, business or profession.

The question is to know whether the legal framework protecting consumers should apply in this case.

³¹ In some cases, the professional (provider) could also suffer from a lack of knowledge, for instance when the buyer acts anonymously. In any case, when the only duty of the consumer is to pay for the goods or the service, providers protect themselves against consumers' non performance by requiring payment before the delivery of the goods or the provision of the service.

³² The definition of "service provider" does not prohibit a consumer from providing an information society service; for instance, any natural person could sell on their blog some goods found in their attic, for private purposes. In any case, taking into account the duties required by articles 10 and 11 of the directive, it may be argued that the European legislator has not considered that the service provider could be a consumer. Indeed, it appears out of proportion to require that the seller (in this example) must provide the recipient of the service, information on the "different technical steps to follow to conclude the contract" (Art. 10, 1, a), "acknowledge the receipt of the recipient's order without undue delay and by electronic means" (Art. 11, 1) or "makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order" (Art. 11, 2). Hence, those articles of the directive on electronic commerce only apply in B2C and B2B relationships.

Accordingly, agreements can fall within the scope of these directives. Nevertheless, in some cases, contract relationships can be established between consumers (C2C).

For instance, this can occur when a "virtual good" is acquired by a consumer, from another consumer, in a virtual world such as "*Second Life*". If the agreement remains outside the scope of the abovementioned directives, protection rules (see 3 below) do not apply.

In my opinion, when the parties enter into contract, consumers should be legally protected. Indeed, they are as vulnerable or disadvantaged as consumers who are entering a contract with a party acting in the course of their trade, business or profession. Their weak position is not only a consequence of the strength of the other party acting in the course of their business activities (fully informed and in a strong bargaining position), but can also arise from the kind of service specified in the contract – digital content –, the manner in which the contract is concluded (by electronic means) and, in general, the probable lack of information.

Although the principal EU directives to protect consumers do not have to be observed in all C2C agreements, general contract law, applicable in each Member State, has to be observed (information requirements, good faith, consent, rules of proof, etc.)³³. Nevertheless, in most cases, these rules do not take into account the specific difficulties of the contracting parties. The parties are supposed to be on an equal playing field, but this is not the case, so the rules are not sufficient to protect consumers. If general contract law was sufficient protection, then specific EU directives would not have been enacted to protect the consumer.

Accordingly, a new legal framework, aimed at protecting consumers entering into a contract with other consumers, should be adopted. A new legal framework should be enacted to impose certain obligations (the service provider's duty to

³³ On the application of general contract law to C2C relationships on online auction websites, Ch. Riefa, "La protection des consommateurs sur les plates-formes de courtage en ligne : point de vue d'outre-manche", *Revue européenne de droit de la consommation – European Consumer Law Journal*, 2005/4, p. 336-340.

provide information, for instance) on the intermediary³⁴, i.e. the platform that puts the consumers in contact with one another (for instance *Second Life*).

Other issues could also arise. Considering the definition of "provider", in some cases, it may be very difficult to make a distinction between persons acting in course of their trade, business or profession or outside these. How many transactions are needed to consider that selling is the day-to-day business of a natural person? The answer must be provided by Courts and Tribunals, considering the facts of the dispute and, in some borderline cases, debate will certainly occur. It must be noted that there are also tax implications.

c) Additional weakness suffered by some consumers

Some parties to the contract could also suffer from additional difficulties, compared with the average consumer. These may result from their age, mental or physical disability. Many children under the age of 18 (sometimes much younger) are connected to the internet, in blogs or social networks. They are recipients of all kinds of publicity and contracts could be concluded by minors (to get ring tones for mobile phones or to play online games, sometimes through cloud gaming services).

We can only regret that very few rules, within European legal framework, take into account this specific problem³⁵. Regarding legal minors specific (lack of experience, uninformed consent, and possible abuses by the other party), explicit rules should be adopted³⁶.

³⁴ One could also wonder if exemption of liability, prescribed by article 14 of directive 2000/31/EC on electronic commerce, could be called for by the intermediary. On the application of liability's exemption to online auction websites, see Ch. Riefa, "La protection des consommateurs sur les plates-formes de courtage en ligne : point de vue d'outre-manche", *Revue européenne de droit de la consommation - European Consumer Law Journal*, 2005/4, p. 317-320 ; Forum des droits sur l'internet, *Recommandation : Commerce entre particuliers sur l'internet. Quelles obligations pour les vendeurs et les plates-formes de mise en relation*, 8 November 2005, p. 10-13 ; E. Montero, "Sites de vente aux enchères et offres de vente illicites", comment of the Commercial Court of Brussel, decision of 30 July 2008, *Revue du droit des technologies de l'information*, 2008, p. 528 et seq. (on this decision, see also H. Croux and O. Sasserath, "Belgium: Sale of Counterfeit Goods on eBay", *CRi*, 2008/5, p. 152) ; G. Teissonniere, "Quelle responsabilité appliquer aux plates-formes de commerce en ligne et autres intermédiaires de contenu", *Revue Lamy Droit de l'Immatériel*, 2008/35, n° 1165, p. 21 ; M. Schaffner and A. Abello, "LVMH c. eBay : une synthèse des questions relatives à la responsabilité des plates-formes d'enchères", *Revue Lamy droit de l'immatériel*, 2008/41, n° 1372, p. 75. On liability of online auction website in general, see also A. Guadamuz González, "eBay Law: The legal implication of the C2C electronic commerce model", *Computer Law and Security Report*, 2003, p. 468.

³⁵ See Art. 5 (3) and point 28 of Annexe I of directive 2005/29/EC on unfair commercial practices.

³⁶ On the protection of minors, see M. Demoulin, "Les mineurs et le commerce électronique : besoin de protection ou d'autonomie ?", *Journal des Tribunaux*, 2007,

2.3 Technical methods used to conclude the contracts

In our case study, contracts on digital contents are at least concluded by electronic means: by the exchange emails, on a traditional eCommerce website or through a peer-to-peer marketplace. Contract duties of the supplier (mainly the provision of digital services) can be performed online (download, SaaS, etc.) or offline (CD-ROM sent by traditional mail). This paper focuses on the first hypothesis: contracts are concluded and performed online. Directives 93/3/EEC on unfair contract terms and 2005/29/EC on unfair commercial practices have to be observed even if this feature is not necessarily required: the use of electronic means or any other distance communication means does not limit the scope of directives. In contrast, directive 1999/44/EC on the sales of consumer goods would not apply when digital contents are provided by electronic means (see 2.1 above), whether the contract was concluded online or offline.

The scope of directive 97/7/EC is limited to contracts concluded at a distance. Directive 2000/31/EC is even more limited: services provided at a distance and by electronic means. It can be supposed that, in the opinion of European legislator, these features can be more problematic for consumers.

When contracts are concluded at a distance, i.e. without the physical presence of the supplier and the consumer together, the problematic aspects are related to the characteristics of the goods or service, which cannot be seen and verified as in a traditional shop³⁷, and to the identity of the other party to the contract. Parties do not meet each other physically, and they can not properly discuss the contract as they would have done in a supplier's place of business, for instance an exchange of information and questions on the rights which are legally granted to them. Protection rules of directive 97/7/EC on distance contracts aims principally at reducing this informational asymmetry, because of distance communication, to ensure that the consumer provides informed consent (for these measures, see section 3 below).

In the contract relationship established at a distance and by electronic means, in addition to the aforementioned problem areas, it must be stressed that some people might not be familiar with the use of information technologies (email, internet, etc.). So, the contract relationship is not balanced because some recipients of the information society services are not able to correctly use these technologies. This is the reason why, in particular, the directive 2000/31/EC on electronic commerce requires that technical means to identify and correct recipient input errors are made available³⁸.

p. 105 et seq. ; A. Nottet, "Mineurs et téléphonie mobile", *Revue Générale de Droit Civil*, 2008, p. 239 et seq.

³⁷ See Recital 14 of directive 97/7/EC on distance contracts: "whereas the consumer is not able actually to see the product or ascertain the nature of the service provided before concluding the contract [...]".

³⁸ Art. 11 (2) of the directive.

3 Consumer Protection Rules

Regarding the consumer's disadvantages, several protection rules are provided by abovementioned directives. This paper focuses on information duties and formal requirements (A), the right of withdrawal (B) and the conformity requirements and guarantees (C). The objective of this second part of the paper is to determine if protection rules are an appropriate answer to the weak position of digital content's consumers (neither insufficient nor excessive).

With reference to the subject of the paper, further developments on the prohibition of unfair contract terms (dir. 93/13/EEC) and unfair commercial practices (dir. 2005/29/EC) do not have to be examined. These rules have to be observed in our case study³⁹ but the specificities of digital content do not require a deep analysis in the event of possible amendments (to correct current legal framework).

3.1 Service provider's duty to provide information and to fulfil formal requirements

The consumers' weak position lies mainly in a lack of knowledge on factual and legal data of the relationship. So, in order to guarantee informed consent, information duties are imposed to the professional supplier⁴⁰. More precisely, in our case study, the information asymmetry is caused by the manner in which the contract relationship is established (electronic means used to conclude and perform the contract) and the object of the agreement (digital content). As mentioned before, in the directives, there is no provision especially dedicated to contracts as regards digital contents. So, this paper will analyze the service provider's duty to provide information prescribed by directive 97/7/EC on distance contracts and directive 2000/31/EC on electronic commerce, in order to determine whether they are appropriate for digital content.

³⁹ For instance, it could be asked if the following terms, from a provider of online edition of documents, could not be considered as unfair contract terms: "Subject to overall provision in paragraph [...], you expressly understand and agree that XXX, its subsidiaries and affiliates, and its licensors shall not be liable to you for : [...] B. any loss or damage which may be incurred by you, including but not limited to loss or damage as a result of : [...] II. any change which XXX may take to the services, or for any permanent or temporary cessation in the provision of the services (or any features within the services) ; the deletion of, corruption of, or failure to store, any content and other communications data maintained or transmitted by or through your use of the service". These may indeed be considered as unfair terms which have the object or effect of "(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations" or "(k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided" (Art. 3 (3) and annex of directive 93/13/EEC on unfair contract terms).

⁴⁰ Art. 4 and 5 of directive 97/7/EC on distance contracts; Art. 5, 10 and 11 of directive 2000/31/EC on electronic commerce.

The service provider's duty to provide information prescribed by directives 97/7/EC and 2000/31/EC concerns the identity of the supplier, the main characteristics of the goods or services, the price, and/or the rights of the consumer (right of withdrawal, information on after sales service, guarantees, etc.). The electronic commerce directive also takes into account the inaccurate use of information technologies by the recipient of the service and possible errors (they could have a connection problem and acquire the same content twice, for instance). So, this directive specifies several steps, dealing with different technical aspects that must be followed to conclude the contract and/or the technical means for identifying and correcting input errors prior to placing the order⁴¹.

These duties to provide information look appropriate regarding the problems due to the use of electronic means. However, we might ask if they are sufficient for the problems as regards the provision of digital content. In fact, in certain situations, the lack of knowledge could also be related to playability, interoperability or DRM (Digital Right Management) issues⁴². For instance, a consumer could download a movie in a format incompatible with his current hardware or software. Furthermore, technical protection measures could prevent him from copying downloaded music, as expected. Information on these subjects is not expressly required. Pursuant to directive 97/7/EC, the consumer will be provided with information on "the main characteristics of the goods or services" but the question is whether suppliers of digital contents will include this kind of data and, in case of dispute, whether a court of justice would consider it a "main characteristic". Some discrepancies can be expected. In any case, unless a judgement of the European Court of Justice provides a clear application of this provision, it would seem excessive to impose such a detailed information duty in directive 97/7/EC. It may be that the best approach would be to allow consumer to test digital content, in order to ensure its playability and interoperability. From a functional point of view consumer's protection would be even more effective in this case.

In order to protect the consumer and allow their informed consent, formal requirements are prescribed at European or national level (a written contract, with specific contractual terms, for instance). Pursuant to directive 97/7/EC on distance contracts, the consumer will receive written confirmation or confirmation in another durable medium available and accessible to them of the information referred to in ...⁴³. According to the directive on electronic commerce, "the service provider has to acknowledge the receipt of the recipient's

⁴¹ See Art. 10 (1) (a) and (c) of directive 2000/31/EC on electronic commerce. See also Art. 11 (2) of the same directive: "Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order".

⁴² See F. Coppens, M. Demoulin, R. Robert and S. Dusollier, *Digital products in the acquis communautaire in the field of consumer protection*, Research study for the BEUC, 2009, p. 21 et seq.

⁴³ Art. 5 (1) of the directive.

order without undue delay and by electronic means"⁴⁴. Considering the increase of legal formalities in the last several years, legal scholars have pointed out a revival of the phenomenon of formalism, especially in consumer contracts. Taking into account this legal framework, a crucial issue arises with the development of the information society: how can one perform these formalities by electronic means in conformity with legal requirements? From a practical point of view, it is very important to provide a concrete answer to this question. As expected, to face the problem, legal scholars have forged the so-called "functional equivalent theory": according to this theory, any technical mechanism which fulfils the same functions as the traditional formal mechanism must be recognized as a legal equivalent to the traditional mechanism. In Belgium, as well as in most European countries, legal solutions remove obstacles to the conclusion of (private or public) contracts by electronic means. These initiatives reveal a political will to recognize the advantage of IT to satisfy legal procedures. It is important to underline that, in the above examples, European legislators use a neutral terminology (acknowledge receipt, communicate information, etc.) or legal terminology especially adapted to the traditional (paper) methods or to Information technologies (durable medium).

It must be also stressed that, in most cases, information technologies do not constitute an obstacle to the fulfilment of the service provider's information duties. Further, it is relatively easy with IT to clarify key elements (with colour, sound, specific animations, etc.) or to explain particular terms (a short movie, for instance), exploiting all the possibilities offered by new media. However, when a mobile phone is used to conclude an agreement or to acquire digital content (ring tone, games, music, etc.), one can ask if the legal requirements have to be fulfilled (or even, from a technical point of view, if they can be fulfilled)⁴⁵.

3.2 Right of withdrawal

To protect their consent, a right of withdrawal is granted to consumers by directive 97/7/EC on distance contracts (art. 6). During a period of seven working days, consumers can withdraw from the contract without penalty or justification. If the right of withdrawal has been exercised by the consumer pursuant to legal requirements, the supplier shall be obliged to reimburse the sums paid by the consumer free of charge and, in any case, within 30 days⁴⁶. The right of withdrawal is a good measure to compensate the weak consumer position. If goods or services acquired at a distance do not fit with their expectations, the consumer may escape from his commitments.

Several cases, mentioned in directive 97/7/EC, do not permit the consumer to exercise their right of withdrawal. This is the case "for the provision of services if performance has begun, with the consumer's agreement, before the end

of the seven working day period referred to in paragraph 1" or "for the supply of audio or video recordings or computer software which were unsealed by the consumer"⁴⁷. Both exceptions, which could apply to digital content, show European legislator's objectives that are similar. If the performance of service has begun or if software, audio or video recordings are unsealed, the right of withdrawal cannot be materially exercised, taking into account the interests of both parties. Video-on-demand that has been watched cannot be returned and it would be absurd to upload (return) software (which could have been copied, for instance)⁴⁸. Accordingly, it is legitimate to exclude the right of withdrawal in these cases.

Thus the following question arises: does the conclusion of a contract on digital content at a distance change the central aspect of consumer's informed consent, as compared to a movie, software or music acquired in a traditional shop (sale of a CD or DVD). In the affirmative, a protection measure, whose effects are equivalent to the right of withdrawal is required and should be elaborated in order to ensure informed consent. It is pretty clear to understand that the consent given to purchase a pair of shoes on a website is not sufficiently informed⁴⁹; so the consumer must have the opportunity to exercise a right of withdrawal, in particular if the size or the colour does not fit with consumer's expectations. However, it is quite unusual that, when buying music (on CD), a movie (on DVD) or a videogame (on CD-ROM) in a traditional shop, the consumer is allowed to listen to the music, watch the movie, or play the game. So, it could be argued that such a possibility should not be granted when the same content is acquired online.

Nevertheless, it must be stressed that, thanks to the benefits of information technologies and specific features of digital contents, the objectives of the right of withdrawal could be achieved with measures currently uncovered by the law. For instance, before acquiring a song, a movie or software, the consumer could be allowed to listen to the refrain of the song; to watch the trailer of the movie or to test the software⁵⁰. At the same time, he could also check the playability and interoperability of the digital content. Moreover, in case of long term cloud computing services (cloud gaming or online editing software, for instance), a specific right of withdrawal could be granted to the consumer: more precisely the *ratio legis* of the first exception – provision of services if performance has

⁴⁷ Art. 6 (3) of the directive. On these exceptions, see M. Demoulin, *Droit des contrats à distance et du commerce électronique*, Brussels, Kluwer, to be published, 2010, nr 90 et seq.

⁴⁸ See also Recital 34 of the proposal for a directive on consumer rights: "in case of distance contracts for the provision of services, for which the performance begins during the withdrawal period (e.g. data files downloaded by the consumer during the period), it would be unfair to allow the consumer to withdraw after the service has been enjoyed by the consumer in full or in part. Therefore the consumer should lose his right of when the performance begins with his prior express agreement".

⁴⁹ In a traditional shop, the consumer would have had the opportunity to see the colour of the shoes and to wear them a few minutes in order to verify the size.

⁵⁰ While this is not required by Law, many providers already grant this kind of service.

⁴⁴ Art. 11 (1) of the directive.

⁴⁵ On this topic, see P. Congo, "Le droit du commerce électronique à l'épreuve du commerce mobile", *Revue du droit des technologies de l'information*, 2010/40, to be published.

⁴⁶ Art. 6 (2) of directive 97/7 on distance contracts.

begun, with the consumer's agreement, before the end of the seven working day period – is no longer justified in this case. Indeed, there is no risk of a created copy (because content has never been downloaded) and it is not unfair to allow the consumer to withdraw because the service has only been enjoyed to ensure it operates within expectations. Of course, in this case, the withdrawal period of seven working days could be discussed.

In my opinion, the legal framework should be modified to take into account this opportunities.

3.3 Conformity requirements and guarantees

As explained above, the application of protection rules prescribed by directive 1999/44/EC on the sale of consumer goods (conformity requirements and guarantees) to digital contents is controversial. A distinction was made between digital content in and of itself and the way it is delivered to the recipient (see 2.1 above).

Digital content in itself should never be considered as “good” within the meaning of the directive and, therefore, should be excluded from the scope of the directive. However, a lack of conformity could be suffered by the consumer.

With reference to *the way digital content is provided* to the recipient, if a problem is encountered with the physical medium, the consumer will be allowed to benefit from protection rules prescribed by directive 1999/44/EC, but if the same content is downloaded by the consumer, they will not benefit from the provisions of this directive.

Therefore, *de lege ferenda* (i.e. “where the law should act”), the possibility of introducing similar rules for “services” should be considered. For some service contracts (“*contrats d'entreprise*” in Belgian or French Law), remedies exist in case of lack of conformity, pursuant to general theory of contracts⁵¹. Rules could be adopted at the European level⁵².

⁵¹ See F. Labarthe et C. Noblot, *Le contrat d'entreprise*, Paris, L.G.D.J., 2008, p. 268 and seq.; M.-A. Flamme, Ph. Flamme, A. Delvaux et F. Pottier, *Le contrat d'entreprise. Chronique de jurisprudence 1990-2000*, Dossier du J.T., Brussels, Larcier, 2001, p. 225 et seq.

⁵² In order to establish if there is a lack of conformity, the criteria of directive 1999/44/CE could be a source of inspiration, to be implemented in case of “services”. Pursuant to Article 2 (2) of the directive, “consumer goods are presumed to be in conformity with the contract if they: (a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model; (b) are fit for any particular purpose for which the consumer requires them and which they made known to the seller at the time of the conclusion of the contract and which the seller has accepted; (c) are fit for the purposes for which goods of the same type are normally used; (d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or their representative, particularly in advertising or on the labeling”.

4 Conclusion

The overview of European legal framework protecting consumers has highlighted that, in the case of digital contents, numerous rules are presently to be observed by the parties (the service provider's duty to provide information, the prohibition of unfair contract terms and unfair commercial practices). However, most measures do not take into account the features of digital content and the particularly weak position of consumers acquiring them. Furthermore, the scope of some directives precludes the application of numerous protecting rules in our case study (right of withdrawal, guarantees, etc.).

Where necessary, the current legal framework should be amended to ensure a high level of protection to consumers. It is also of particular importance to address the needs and requirements of professional suppliers, in order to establish a balanced solution.